

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

)	
)	
In Re: Bair Hugger Forced Air)	File No. 15-MD-2666
Warming Devices Products)	(JNE/FLN)
Liability Litigation)	
)	July 19, 2018
)	Minneapolis, Minnesota
)	Courtroom 12W
)	9:45 a.m.
)	
)	

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

THE HONORABLE FRANKLIN L. NOEL
UNITED STATES MAGISTRATE JUDGE

THE HONORABLE DAVID T. SCHULTZ
UNITED STATES MAGISTRATE JUDGE

(STATUS CONFERENCE)APPEARANCESFOR THE PLAINTIFFS:

MESHBESHER & SPENCE
Genevieve M. Zimmerman
1616 Park Avenue
Minneapolis, MN 55404

CIRESI CONLIN
Jan Conlin
225 South 6th Street
Suite 4600
Minneapolis, MN

KENNEDY HODGES, LLP
Gabriel Assaad
4409 Montrose Blvd
Suite 200
Houston, TX 77006

1 FOR THE PLAINTIFFS:

2 KENNEDY HODGES, LLP
3 David W. Hodges
711 W. Alabama Street
Houston, TX 77006

4 KASTER LYNCH FARRAR & BALL, LLP
5 Kyle Farrar
1001 Fannin St. #2300
6 Houston, TX 77002

7 FOR THE PLAINTIFFS APPEARING BY PHONE:

8 LEVIN PAPANTONIO
Ben W. Gordon, Jr.
316 S. Baylen Street
9 Suite 600
Pensacola, FL 32502

10
11 MESHBERESHER & SPENCE
Holly Sternquist
12 Ashleigh E. Raso
1616 Park Avenue
13 Minneapolis, MN 55404

14 PETERSON & ASSOCIATES, P.C.
Brian Emerson Tadtman
15 801 W. 47th Street, Suite 107
Kansas City, MO 64112

16 BERNSTEIN LIEBHARD LLP
17 Dae Lee
10 East 40th Street
18 New York, NY 10016

19 THE OLINDE FIRM, LLC
Alfred Olinde
20 Wesley G. Barr
400 Poydras Street
21 Suite 1980
New Orleans, LA 70130

22 MORGAN & MORGAN, PA
23 Heather Cullen
Michael S. Goetz
24 Joseph T. Waechter
201 N. Franklin St 7th Floor
25 Tampa, FL 33602

Telephone Appearances cont'd next page:

1 FOR THE PLAINTIFFS APPEARING BY PHONE:

2 RAIZNER SLANIA, LLP

3 Amy Hargis

4 Erin Stracerner

5 Kristen Gorombol

6 2402 Dunlavy Street

7 Houston, TX 77006

8 LONCAR & ASSOCIATES

9 William Hymes

10 John L. Coveney

11 424 S. Cesar Chavez Blvd

12 Dallas, TX 75201

13 CAPRETZ & ASSOCIATES

14 Don K. Ledgard

15 5000 Birch St, Suite 2500

16 Newport Beach, ca 92660

17 MICHAEL HINGLE & ASSOCIATES

18 Colleen Euper

19 Bryan Pfleeger

20 220 Gause Blvd

21 Slidell, LA 70005

22 HOUSIERE DURANT & HOUSIERE

23 Randall A. Kauffman

24 Monica Vaughan

25 Shirley Strom-Blanchard

1990 Post Oak Blvd Suite 800

Houston, TX 77056

DAVIS & CRUMP, PC

Robert Cain, Jr.

2601 Fourteenth Street

Gulfport, MS 39507

SKIKOS CRAWFORD SKIKOS&

JOSEPH, LLP

Darilyn Simon

Julie Tucci

One Sansome Street, Suite 2830

San Francisco, CA 94104

THE RUTH TEAM

Austin Grinder

Steven C. Ruth

842 Ramond Avenue

Suite 200

Saint Paul, MN 33733-5157

1 FOR THE PLAINTIFFS APPEARING BY PHONE:

2 TATE LAW GROUP, LLC
3 Wendy Kell
4 2 East Bryan Street, Suite 600
5 Savannah, GA 31328

6 LAW OFFICE OF TRAVIS R. WALKER
7 Julie Treacy
8 1235 SE Indian Street
9 Suite 101
10 Stuart, FL 34997

11 LAW OFFICES OF JAMES S. ROGERS
12 Heather Cover
13 1500 4th Avenue #500
14 Seattle, WA 98101

15 ANDREWS & THORNTON
16 Anne Andrews
17 John Thornton
18 Lauren Davis
19 2 Corporate Park, Suite 110
20 Irvine, CA 92606

21 JOHNSON BECKER PLLC
22 Lisa Groshe
23 444 Cedar Street
24 Suite 1800
25 Saint Paul, MN 55101

LORD & ASSOCIATES
Melissa Marie Heinlein
Priscilla Lord
309 Clifton Avenue
Minneapolis, MN 55403

MURRAY LAW FIRM
Caroline Whitney Thomas
650 Poydras Street
Suite 2150
New Orleans, LA 70130

BROWN & CROUPPEN, PC
Abby Cordray
Seth Webb
Vanessa Mixco
211 North Broadway, Suite 1600
St. Louis, MO 63102

Telephone Appearances cont'd next page:

1 FOR THE PLAINTIFFS APPEARING BY PHONE:

2 BEASLEY ALLEN
3 Renee Lindsey
4 218 Commerce Street
5 Montgomery, AL 36104

6 BROUS LAW
7 Carrie Mulholland Brous
8 3965 West 83rd St., #115
9 Prairie Village, KS 66208

10 HOLLIS LEGAL SOLUTIONS, PLLC
11 Scott Hollis
12 6814 Crumpler Boulevard,
13 Suite 101
14 Olive Branch, MS 38654

15 PARKER WAICHMAN, LLP
16 Giselle Grant
17 Michael S. Werner
18 59 Maiden Lane
19 6th Floor
20 New York, NY 10038

21 RANDALL J. TROST, P.C.
22 Carrie Hancock
23 801 Main Street
24 Lynchburg, VA 24504

25 THE MILLER FIRM, LLC
Tayjes M. Shah
The Sherman Building
108 Railroad Avenue
Orange, VA 22960

WALTERS LAW FIRM, LLC
Lon Walters
23A East 3rd St
Kansas City, MO 64106

FITZGERALD LAW GROUP, LLC
Kevin Fitzgerald
120 Exchange Street
Suite 200
Portland, ME 04101

Telephone Appearances Cont'd Next Page:

1 FOR THE PLAINTIFFS APPEARING BY PHONE:

2 LANGDON & EMISON
3 Lauren Niendick
4 911 Main Street
5 Lexington, MO 64067

6 LEWIS & CAPLAN
7 Amy Webster
8 Sarah Delahoussaye Call
9 Pete Lewis
10 3631 Canal Street
11 New Orleans, LA 70119

12 THE RUTH TEAM
13 Steven C. Ruth
14 Austin Grinder
15 842 Ramond Avenue
16 Suite 200
17 Saint Paul, MN 33733-5157

18 BAILEY PEAVY BAILEY COWAN
19 HECKAMAN, PLLC
20 Justin Jenson
21 The Lyric Centre
22 440 Louisiana Street
23 Suite 2100
24 Houston, TX 77002

25 THE WEBSTER LAW FIRM
Chelsie Garza
Jason Webster
6200 Savoy Suite 150
Houston, TX 77036

ALBERT BROOKS FRIEDMAN LTD
Albert B. Friedman
Kelly Lopez
161 N. Clark Street
Suite 2575
Chicago, IL 60601

GOZA & HONNOLD, LLC
Lisa Joyce
Kirk Goza
Bradley Honnold
11181 Overbrook Road, Suite 200
Leawood, KS 66211

FOR THE PLAINTIFFS APPEARING BY PHONE:

1	MARTIN HARDING & MAZZOTI, LLP
2	Rosemarie Bogdan
3	Kristen Winner
4	1222 Troy-Schenectady Road
5	P.O. Box 15141
6	Albany, NY 12212-5141
7	JUSTINIAN & ASSOCIATES PLLC
8	Amber Pang Parra
9	6228 Bandera Road
10	San Antonio, TX 78238
11	SHELTON LAW GROUP
12	Rob Shelton
13	9300 Shelbyville Road
14	Suite 215
15	Louisville, KY 40222
16	SHOWARD LAW FIRM PC
17	Elizabeth Whitley
18	Sarah J. Showard
19	Elizabeth Whitley
20	4703 E Camp Lowell Drive
21	Suite 253
22	Tucson, AZ 85712
23	BACHUS & SCHANKER, LLC
24	Alexandra Franklin
25	Allison Brown
26	Darin Schanker
27	J. Kyle Bachus
28	Krysta Hand
29	Kyle Bachus
30	J. Christopher Elliott
31	Noelle Collins
32	1899 Wynkoop Street, Suite 700
33	Denver, CO 80202
34	CHAPPELL SMITH & ARDEN, P.A.
35	Graham L. Newman
36	Mark Chappell
37	15150 Calhoun Street
38	Columbia, South Carolina 29201
39	COLLING GILBERG WRIGHT & CARTER
40	Linda Ann Thomas
41	Melvin B. Wright
42	The Florida Firm
43	801 N. Orange Avenue, Suite 830
44	Orlando, FL 32801

1 FOR THE PLAINTIFFS APPEARING BY PHONE:

2 PRITZKER HAGEMAN, P.A.
David J. Szerlag
3 Wendy Thayer
4 45 South 7th Street, #2950
Minneapolis, MN 55402-1652

5 JOHNSON BECKER, PLLC
Lisa Groshe
6 33 South 6th Street
Suite 4530
7 Minneapolis, MN 55402

8 JOHNSON JOHNSON LUCAS &
MIDDLETON
9 Leslie O'Leary
Brenda Steinle
10 975 Oak Street, Suite 1050
Eugene, OR 97401

11 DEGARIS LAW GROUP, LLC
12 Annesley DeGaris
Wayne Rogers, Jr.
13 3179 Green Valley Road 235
Birmingham, AL 35243

14 GINGRAS CATES & LUEBKE
15 Heath P. Straka
Scott Thompson
16 8150 Excelsior Drive
Madison, WI 53717

17 MORRIS LAW FIRM
18 Jim Morris
Shane Greenberg
19 Alec Smith
Lorena Ruiz
20 4111 W. Alameda Avenue
Suite 611
21 Burbank, CA 91505

22 THE AHEARNE LAW FIRM, PLLC
Allan J. Ahearne
23 Jessica Pauley
24 24 Main Street
Warwick, NY 10990

25 FOR THE PLAINTIFFS APPEARING BY PHONE:

1 MCSWEENEY LANGEVIN
Jonathan Mencil
2 2116 Second Avenue South
Minneapolis, MN 55404

3 GOLDENBERG LAW, PLLC
4 Noah Lauricella
800 LaSalle Avenue
5 Suite 2150
Minneapolis, MN 55402

6 THE WHITEHEAD LAW FIRM
7 C. Mark Whitehead III
Anna Higgins
8 Petroleum Tower, Suite 303
3639 Ambassador Caffery Pkwy
9 Lafayette, LA 70503

10 THE REARDON LAW FIRM, PC
John Nazzara
11 160 Hempstead Street
New London, CT 06320

12 LAW OFFICE OF MICHAEL PATRICK
13 Michael W. Patrick
100 Timberhill Place, Suite 127
14 PO. Box 16848
Chapel Hill, NC 27516

15 FOR THE DEFENDANTS:

16 BLACKWELL BURKE P.A.
Jerry Blackwell
Ben Hulse
17 Mary Young
431 South Seventh Street
18 Suite 2500
Minneapolis, MN 55415

19 FAEGRE BAKER DANIELS
20 Bridget M. Ahmann
90 South Seventh Street
21 Suite 2200
Minneapolis, MN 55402

22 COURT REPORTER:

23 Maria V. Weinbeck, RMR, FCRR
U.S. Courthouse
300 South Fourth Street
24 Suite 1005
Minneapolis, MN 55415

25 Proceedings recorded by mechanical stenography;
transcript produced by computer.

P R O C E E D I N G S

(2:09 p.m.)

THE COURT: Good afternoon, everybody. Please be seated. In honor of Judge Noel's impending retirement, he's going to take the lead here today.

MAGISTRATE JUDGE NOEL: I've been promoted to the center seat.

THE COURT: Only on the promise that you're going to retire.

MAGISTRATE JUDGE NOEL: And as many of you or maybe all of you know, my successor in this role as magistrate judge assigned to this MDL is going to be Magistrate Judge David Schultz, who is also joining us today. I believe we have everybody's appearance on the record already, correct? Yes? Then with that, we have an agenda. Let's just go straight to it.

MR. BLACKWELL: Your Honors, if I may, I did have a guest or two.

THE COURT: Who are you?

MR. BLACKWELL: I'm just Jerry. We're in a Movember in July, Your Honor.

MAGISTRATE JUDGE NOEL: Mr. Blackwell.

MR. BLACKWELL: Yes, Your Honors. I had just a couple of guests I wanted to introduce to the Court.

MAGISTRATE JUDGE NOEL: Okay.

1 MR. BLACKWELL: One of whom is going into the
2 eleventh grade at the Blake High School. We thought we
3 would start early to see if we could persuade him to come to
4 our firm, and that is Mr. Aaryan Gulati back here. He's
5 devoted to being a lawyer.

6 MAGISTRATE JUDGE NOEL: Welcome.

7 MR. BLACKWELL: And then our associate
8 extraordinaire who hasn't been able to come to one of these
9 conferences next to him is Vinita Banthia.

10 MS. BANTHIA: Nice to meet you, Your Honors.

11 MAGISTRATE JUDGE NOEL: Welcome.

12 MR. BLACKWELL: And you may remember siting
13 through the trial, Haley Schaffer, who was our
14 representative from 3M, our inhouse counsel, Haley Schaffer.
15 So thank you, Your Honors.

16 MAGISTRATE JUDGE NOEL: Okay, welcome all.

17 THE COURT: Anybody over there?

18 MAGISTRATE JUDGE NOEL: Any guests for the
19 plaintiffs?

20 MS. ZIMMERMAN: No, Your Honors. We have the
21 standard cast of characters here, and we're happy to be back
22 before the Court.

23 MAGISTRATE JUDGE NOEL: All right then. Let's
24 move on to the agenda. The first is the pretrial orders and
25 case schedule. Does anybody want to address that issue?

1 Hives?

2 MS. ZIMMERMAN: I'll step off the curb. May it
3 please the Court.

4 MAGISTRATE JUDGE NOEL: Ms. Zimmerman.

5 MS. ZIMMERMAN: Genevieve Zimmerman, as I haven't
6 had the opportunity to appear before you, Your Honor, for
7 plaintiffs.

8 With respect to the two cases that were mutually
9 nominated by plaintiffs and defendants for consideration in
10 the second round of bellwether cases for trial later this
11 year, we have the *Hives* case and the *Axline* case. The
12 attorneys for Ms. Hives dismissed the case with prejudice on
13 July 7th based on some new information found in that case
14 and that leaves us then with the *Axline* case. Lawyers for
15 Ms. Axline are not present in the courtroom today, but we
16 have been working cooperatively with them.

17 Unfortunately, there was to be a deposition of the
18 treating orthoped just I think 36 hours ago or so. All the
19 attorneys showed up and Dr. Lombardi had a family emergency
20 and had to cancel, and so we're in the process of working
21 with his office. He is not voluntarily participating with
22 either side, and we're hoping to have that rescheduled,
23 though at this point it's my understanding we are really
24 looking somewhere past the eighth or ninth of August as the
25 last that I heard from Ms. Ahmann I believe. So we're still

1 a couple of weeks out. And at this point, we fear that that
2 may well require some sort of a modification of the
3 scheduling order unfortunately. So as it currently sits --

4 MAGISTRATE JUDGE NOEL: Do we know what happened,
5 first of all, where is this deposition supposed to occur?

6 MS. ZIMMERMAN: So it's supposed to happen in
7 Columbus, Ohio, Your Honor. And Mr. Hodges was there as was
8 Ms. Ahmann and Mr. Corey Gordon for defendants, and also
9 then the plaintiffs' lawyer Brett Emison was present, a
10 court reporter, everybody was ready to go, and I gather that
11 there was some sort of a medical emergency in his family,
12 Dr. Lombardi's family, and so he had to leave. Although, I
13 was not present. That's my basic understanding of what
14 happened.

15 MS. AHMANN: Yes.

16 MS. ZIMMERMAN: So he was not able to reschedule
17 for the following morning, and Ms. Ahmann has I think mostly
18 been contacting his office about getting reset notices -- or
19 maybe I'm in the middle of two people.

20 MS. AHMANN: Actually not, but --

21 MS. ZIMMERMAN: Okay.

22 MAGISTRATE JUDGE NOEL: Well, I guess the question
23 I have is in light of the followup you had, which was he's
24 not cooperating with anybody, is this going to require some
25 kind of court intervention? Is he not going to show up

1 because he doesn't want to be deposed? Or was this some
2 legitimate emergency that just was a fluke, and he'll be
3 there the next time?

4 MS. ZIMMERMAN: We certainly would expect it. The
5 plaintiffs would expect that he would agree to produce
6 himself pursuant to the notice. He certainly, you know,
7 he's provided the fee schedule to the plaintiffs. We
8 arrived with a check, you know, and it was a significant
9 check for him. And I think that he's \$5,000 for two hours
10 of testimony or something like that, so he's not
11 volunteering his time. But it is my understanding he will
12 cooperate, but we don't have control over this witness at
13 all.

14 MAGISTRATE JUDGE NOEL: And there's no date yet
15 set?

16 MS. ZIMMERMAN: There is not. My understanding is
17 that his first availability or mutual availability may be
18 the eighth of August and that's the last I have heard anyone
19 talking about that. Is that right?

20 MS. AHMANN: We were just told August, and we said
21 the week of the sixth would be flexible.

22 MS. ZIMMERMAN: Okay. Well, we'll continue to
23 work on that. So right now as the scheduling order sits,
24 the discovery cut-off is August first, and we have a pretty
25 compressed schedule to try and get things ready for

1 December. Plaintiffs' expert reports will be due on
2 August 15th, and if Dr. Lombardi, the main treating orthoped
3 is not deposed until the week of the sixth or the eighth or
4 whatever this ends up being, we just foresee a situation
5 where plaintiffs' experts may need a little bit of extra
6 time to get the reports polished up and concluded. So it's
7 such that we have the treating physicians' opinions.

8 MAGISTRATE NOEL: Just be aware it's my
9 understanding that Judge Ericksen would be very loathe to
10 move the trial date, so --

11 MS. ZIMMERMAN: Thank you for that.

12 MAGISTRATE JUDGE NOEL: -- if there's going to be
13 changes to the schedule at all, it will have to be
14 compressed within that time frame.

15 MS. ZIMMERMAN: Thank you, Your Honor. We
16 understood that from previous telephone conferences with
17 Your Honor.

18 THE COURT: Correct.

19 MS. ZIMMERMAN: And so that is where we're at with
20 respect to those particular cases.

21 MAGISTRATE JUDGE NOEL: Do we know what happened
22 to the Hives case? I mean we went through a whole sort of
23 thing about identifying bellwethers that are going to be
24 real bellwethers and now to have one of them be dismissed
25 with prejudice kind of messes with the thing.

1 MS. ZIMMERMAN: Yes, Your Honors.

2 MAGISTRATE JUDGE NOEL: Do we know what happened?

3 MS. ZIMMERMAN: So I note as a general rule what
4 happened when we were on the phone with Your Honors about it
5 was a telephone conference about accessing the doctor and
6 the doctor was going to fly in from Guam, we also found out
7 that the defendants had requested many records that we and
8 plaintiffs' counsel who represent Ms. Hives had not seen
9 before. And it's my understanding there were approximately
10 10,000 pages of records from a different kind of tertiary
11 care facilities afterwards, and there was some concern about
12 whether or not she was going to be able to go forward, and
13 so she ultimately decided to dismiss her case.

14 MAGISTRATE JUDGE NOEL: All right.

15 MS. ZIMMERMAN: So then the other issue that is
16 covered, I guess, with respect to agenda item number 1,
17 really has to do with moving forward with the bellwether
18 cases and trials in this court. And I don't know if we want
19 to take that up now.

20 MAGISTRATE JUDGE NOEL: Yes, let's go right to
21 that because it's my understanding that the plaintiffs, as I
22 understand the record, the plaintiffs have filed something
23 called retraction of *Lexecon* waivers in essence, and the
24 defendants have filed some memoranda opposing the
25 retraction. And it was my understanding that plaintiffs

1 were going to be filing something, and we haven't seen
2 anything. Is there anything else you want the Court to know
3 about?

4 MS. ZIMMERMAN: Yes, Your Honors. So with respect
5 to trying an additional case in this court, the plaintiffs
6 believe that pursuant to both 1404 and 1407 that the case
7 would actually need to be transferred back to this court
8 formally in order for the Court to retain jurisdiction. And
9 prior to if and when that motion is brought, it is
10 Ms. Axline's position that she is going to oppose that
11 motion to transfer the case here.

12 The case law that we would refer the Court to and
13 we would refer defense counsel to most recently was in the
14 Fifth Circuit in the *Depuy* MDL pending before Judge
15 Kinkeade. The Fifth Circuit considered *Depuy* in that case a
16 defendant's motion to retract *Lexecon* waivers. There is a
17 Fifth Circuit opinion dated August 31st of 2017. And the
18 Fifth Circuit ultimately said that indeed that *Depuy*, while
19 they waived their rights with respect to a few preliminary
20 trials, it was not an indefinite waiver, and because in that
21 instance the defendant was arguing that they did not agree,
22 their brief says that they did not agree to waive *Lexecon*
23 for a prejudicial multi-district trial and, therefore, went
24 up to the Fifth Circuit, and the Fifth Circuit agreed and
25 said that they could in fact retract their *Lexecon* waivers.

1 So with respect to that particular issue, we think
2 that full briefing on the issue to the extent that
3 defendants are going to make a motion under 1404 and 1407 to
4 have the case transferred to be tried here, that there
5 should be full briefing and argument on the issue.

6 MAGISTRATE JUDGE NOEL: Why do you think that
7 there has to be a formal motion by defendants as opposed to
8 there already is your waiver in the record and, therefore,
9 the case is here?

10 MS. ZIMMERMAN: Well, Your Honor, because the
11 waiver was unilateral, and the only waiver that was
12 submitted was by the plaintiffs. The defendants have never
13 waived *Lexecon* with respect to trying the cases in the home
14 states of the plaintiffs, which is typically what's done.

15 Now that the plaintiffs, and I'm just going to if
16 I can speak candidly, plaintiffs from across the country
17 have reviewed transcripts and orders that have come out of
18 the particular trial that we just had, and they would prefer
19 to have, if the law from the home jurisdiction is going to
20 apply, which it seems it may, then the plaintiffs want to
21 have judges from those home jurisdictions also make
22 determinations about corporate conduct and admissibility of
23 that kind of document, those documents, and that kind of
24 conduct made in different jurisdictions.

25 So given that the waiver was made unilaterally by

1 plaintiffs, it was never met with a waiver from defendants,
2 and these are usually mutual waivers on both sides. The
3 plaintiffs feel that this was a unilateral waiver, and they
4 have validly retracted.

5 THE COURT: And what then would be the purpose of
6 even continuing the MDL? What's the MDL purpose at this
7 point then?

8 MS. ZIMMERMAN: Well, Your Honor, I think that
9 that brings up one of the issues that the plaintiffs would
10 like to discuss, and that is when is the appropriate time
11 for remand of these cases? Because and, again, quoting back
12 to the Fifth Circuit case in the *Depuy* matter, it talks
13 about how bellwether trials are meant to produce a
14 sufficient number of representative verdicts and settlements
15 to enable the parties and the Court to determine the nature
16 and strength of the claims and whether they can be fairly
17 developed and litigated on a group basis and also what range
18 of values the cases may have, if the resolution is to be
19 attempted on a group basis.

20 It's our understanding at this point based on
21 orders of the Court and based on responses from defendants
22 with respect to discovery requests, that discovery is closed
23 at this point on general causation issues. And assuming
24 that that is correct pursuant to 1407, transferred actions
25 shall be remanded at the conclusion at or before the

1 conclusion of such pretrial proceedings, so this is
2 mandatory language under the statute. We think that it's
3 time for the parties to confer amongst ourselves and with
4 the Court's guidance about what an appropriate remand
5 schedule may look like.

6 From the plaintiff's perspective to begin with,
7 certainly Walton and Johnson should be the first cases that
8 were remanded. I think the Court is aware those were the
9 two cases that were filed and litigated prior to the
10 creation of this MDL. Defendants took the position in front
11 of the JPML that those two cases should not be included as
12 part of the transfer to this MDL because the discovery had
13 already been done, and they were already ready for trial.

14 So it certainly seems to the plaintiffs that given
15 the defendant's position has been these cases are already
16 ready for trial. These particular plaintiffs have waited
17 several years, despite much discovery done, that they should
18 be remanded back to Texas and Kansas to be tried. And that
19 from there, we should work on developing a plan to remand
20 waves of additional cases for trial assuming that there's
21 not going to be a resolution on the global matter.

22 MAGISTRATE JUDGE NOEL: Okay. Thank you.
23 Mr. Blackwell?

24 MR. BLACKWELL: Your Honor, we'll start with
25 Mr. Hulse.

1 MAGISTRATE JUDGE NOEL: Okay. Mr. Hulse?

2 MR. HULSE: Good afternoon, Your Honors. We've
3 said our peace in our briefing on the retraction of *Lexecon*
4 waivers, and I'm not going to belabor that. I would like to
5 speak to the *Depuy* case out of the Fifth Circuit. Of
6 course, the Court can review the case for yourselves.

7 MAGISTRATE JUDGE NOEL: I could if I have a
8 citation.

9 MR. HULSE: I'm not sure I have it handy, Your
10 Honor.

11 MAGISTRATE JUDGE NOEL: Hold on, let me interrupt
12 you. Ms. Zimmerman, do you have a cite?

13 MS. ZIMMERMAN: Sure, if I may approach. The
14 *Depuy* case out of the Fifth Circuit was 17-10812. The
15 document in question was dated August 31st of '17. And the
16 Fifth Circuit document number is 00514139512. I apologize
17 for the long citation there. We can look and see if we've
18 got a Westlaw cite as well.

19 MAGISTRATE JUDGE NOEL: But there's no thing like
20 blank F.3d blank?

21 MS. ZIMMERMAN: I'll look and see if I can find
22 something more concrete.

23 MR. HULSE: There may not be at this point given
24 it's relatively new, and there's actually another pending
25 appeal. That was a mandamus, and the writ was actually

1 denied in that case based on the availability of posttrial
2 appeal from one of the bellwether cases.

3 So there was another appeal that also relates to
4 the *Lexecon* issue that was argued last month. It's sort of
5 a clash of the titans with Ken Starr arguing for the
6 plaintiffs and Paul Clements for the defense. Interesting
7 case, but the issue there was --

8 MAGISTRATE JUDGE NOEL: Counsel doesn't at all
9 compare to what we have here.

10 MR. HULSE: Well, thank you, Your Honor. I'm sure
11 we all agree.

12 So anyway the issue there was whether the
13 defendants who were on -- it's Johnson Johnson --
14 nonresident in the Northern District of Texas, unlike us who
15 3M is a resident here in the District of Minnesota. Venue
16 is proper here. Personal jurisdiction is proper here for
17 3M. The nonresident defendant, the question that was
18 presented was whether they had in fact waived *Lexecon* before
19 the bellwether cases went to trial. Johnson and Johnson's
20 position was that it never waived *Lexecon* and it turned on a
21 Q and A with a special master in the case and whether the
22 Johnson and Johnson in response to a question from the
23 special master had waived *Lexecon*.

24 The Fifth Circuit in denying the writ of mandamus
25 said, and part of the debate is whether it's dicta or not

1 dicta, is that there was never a waiver of *Lexecon* in the
2 first place. So we don't read that case as being about
3 retraction of waivers. It's about whether there was a
4 waiver in the first place.

5 In our case, there's no question that the
6 plaintiffs waived. We also waived *Lexecon* for the
7 bellwether cases by agreeing that those cases could be
8 considered to be bellwethers. And of course this is our
9 home jurisdiction too, so there really isn't any question
10 about whether venue and personal jurisdiction are proper
11 here for the defendants, so it's questionable whether a
12 *Lexecon* waiver was even required.

13 Beyond that, I'll just say briefly that the case
14 law such as it is, and there's not much of it, I agree. All
15 says that there has to be a showing of good cause to retract
16 a *Lexecon* waiver and that's things like fraud, duress,
17 mistake. But what plaintiffs have pointed to is not a valid
18 mistake. Basically, they're unhappy with the result of the
19 Gareis trial. They're unhappy with some of the evidentiary
20 rulings in that case, but that is not a mistake. Nor was it
21 a mistake for them to purportedly believe that Minnesota law
22 was going to apply to all the cases in this MDL given that
23 choice of law has been a litigated issue going back to
24 punitive damages. Many MDLs, in fact, virtually every MDL
25 has applied the law of the state of the injury, so it was

1 completely foreseeable to them that law of the state of the
2 injury was going to apply to their cases.

3 So there's no mistake, there's no fraud, there's
4 no duress. These were valid waivers. The bell can't be
5 unrung, and so our position is those retractions are
6 invalid, and those cases remain ineligible to be tried in
7 this court.

8 MAGISTRATE JUDGE NOEL: What exactly, refresh my
9 recollection, is *Lexecon*? Is it just a venue provision? Or
10 is it somehow jurisdictional or what does the Court say the
11 right is?

12 MR. HULSE: Well, it's -- that's a matter of some
13 debate, but it's I think generally speaking it's both. And
14 in the Fifth Circuit, it's been addressed actually as an
15 issue of personal jurisdiction too over the defendant, so
16 that when you waive *Lexecon*, you are waiving objection to
17 personal jurisdiction and also waiving objection to venue.

18 Mr. Blackwell is reminding me too that there's
19 actually a very sizable group of cases in this MDL, probably
20 about a quarter of them where the cases were either directly
21 filed here before the PT05, the direct file order went in,
22 so they were filed with full complaint in the District of
23 Minnesota, about 200 of those cases. And then under PT05,
24 in plaintiffs' short form complaints, they were to designate
25 what the remand court was. And we just did a sample, and

1 it's our estimate that somewhere between a thousand and
2 1500 cases in the MDL designated the District of Minnesota
3 as the remand court.

4 The *Partlow* case, which is one of our current
5 bellwethers is one of those cases, but there are a lot of
6 them. So even if plaintiffs' position were correct that the
7 retractions are valid, we still have an enormous pool of
8 cases to be tried here that will remain here for the
9 duration even if post-remand.

10 MAGISTRATE JUDGE NOEL: The last line is a case in
11 which they contend there's been a retraction?

12 MR. HULSE: They did file a retraction, *Axline*,
13 they filed them actually in all of the current eight
14 bellwethers including the one where they've designated the
15 District of Minnesota as the remand court.

16 The one other thing, with the Court's permission,
17 that I would add is in the transfer or the JPML's transfer
18 order, these cases were transferred to and the MDL was
19 created for pretrial proceedings, not simply for the purpose
20 of discovery on common factual issues. And it is, I don't
21 need to belabor this, but that means what it says that even
22 if cases are ultimately remanded for trial, it's routine for
23 MDL courts to take them through discovery.

24 MDL courts frequently resolve summary judgment
25 motions in the cases before remand, and frequently issue

1 evidentiary or cross cutting evidentiary orders, orders
2 essentially on motions in limine that then get carried back
3 post-remand.

4 So the idea that at this point as we did general
5 cause discovery that we would then go and bust up the MDL
6 and send 5,000 cases across the country to conduct
7 discovery, is that's not -- we can't believe that that's
8 what the JPML intended or is it consistent with the statute.

9 THE COURT: One of the things that generally
10 happens at least in my experience with MDLs is in light of
11 the bellwether trial system after one or more such trials,
12 there's then some kind of a triage and settlement thing put
13 into place. Have the defendants made any overtures to any
14 plaintiff about settling any of these case s?

15 MR. HULSE: Well, I think this may be the point
16 where I hand it over to Mr. Blackwell.

17 MAGISTRATE JUDGE NOEL: Above your pay grade?

18 MR. HULSE: I know the answer, but there's other
19 things to talk about that I think he'll address.

20 MR. BLACKWELL: Yes, Your Honor, the answer I
21 probably will say in Spanish, it's a no, and we haven't had
22 those yet. We've got, as the Court well knows, in excess of
23 4,000 cases, and they need to do some work to clean those up
24 before we can even put them in the buckets and tranches to
25 talk about them. There are cases there where they're not

1 product ID that we wouldn't do anything on. There are cases
2 there with extraordinarily long latencies. There are cases
3 there that don't involve Bair Hugger Models 505 or 750.
4 There are cases there that don't involve orthopedic injuries
5 even that are all in that pool.

6 So before, and at least our hope is we've had a
7 bellwether, we've had that now. And the parties in
8 conjunction with the Court think they could stand to do
9 some, erect some sort of screens on the cases to clean up
10 the pool, so that we are talking about what would then be
11 good cases and not have so much question there about cases
12 that either that perhaps don't belong, and it may be
13 premature yet after one bellwether. I'm certain should the
14 Court inquire as to what we're still learning for each side
15 from Gareis, it would probably be the difference between
16 everything for the defense and not much from the plaintiffs,
17 even as to an issue as basic as causation. I don't know
18 that we would agree from a single bellwether.

19 But our thinking is just as a threshold before we
20 can start talking about what it would look like to resolve
21 the whole pool of cases, we'd first want to do some things
22 to clean that up to make sure that the only proper cases are
23 in it and that we have a better sense for of the four to
24 five thousand which of those really belong, so we haven't
25 done that yet.

1 MAGISTRATE JUDGE NOEL: Okay. Ms. Zimmerman, you
2 want to address the settlement question?

3 MS. ZIMMERMAN: Yes, Your Honor. The plaintiffs
4 are in agreement, and at this point there haven't been any
5 kind of discussions along those lines. And I think that
6 that is typically what is intended through the MDL process
7 that either there's going to be trials that lend themselves
8 toward settlement or we have efficiencies gained through
9 common discovery and common motions and then those decisions
10 ultimately follow the cases back to their home jurisdictions
11 where they're ultimately tried.

12 I can tell you I'm involved in the transvaginal
13 mesh litigation. I think there are seven or eight MDLs all
14 consolidated all before Judge Goodwin in West Virginia.
15 He's remanding waves of 800, about one wave of 800 per month
16 right now because there's about a 100,000 cases before him.
17 That litigation has been going on since 2011.

18 But when remand is appropriate or necessary really
19 depends on what kind of discovery is going to be conducted.
20 And at this point, we aren't going to be able to do
21 discovery on a number of general causation issues based on
22 Court Orders and responses from defendants. And there's, at
23 this point, very few plaintiffs who have current waivers of
24 *Lexecon* going forward for these cases.

25 I would say with respect to Mr. Hulse's point

1 about whether or not choice of law has really been
2 established and whether or not there could have been a
3 mistake on the plaintiffs' end throughout the course of this
4 litigation, Minnesota law was absolutely applied by this
5 Court with respect to the punitive damages at that stage of
6 the motion, which is, you know, a year and a half ago now.
7 But Minnesota law was applied, and the parties when they
8 were executing their *Lexecon* waivers assumed Minnesota law
9 would apply, and that was a reasonable assumption for the
10 plaintiffs across the country to make particularly given
11 that this was a product where the genesis is here in
12 Minnesota, where all the marketing happened here in
13 Minnesota, all the tortious conduct happened here in
14 Minnesota. And so it was reasonable for those plaintiffs in
15 executing *Lexecon* waivers to think that Minnesota law would
16 be applied to Minnesota defendants. That's not been the
17 case. And given that, the overwhelming reach on, and I have
18 quite a bit since the trial, plaintiffs just say, well,
19 given that development, which is significant, that they want
20 to have their cases tried in their home jurisdictions, and
21 they're not going to agree to come up here and have their
22 case tried.

23 You know, I think that at the end of the day, they
24 want to make sure that warnings and conduct and negligence
25 are claims that they can bring on behalf of their plaintiffs

1 given the facts and the documents we know here, and those
2 were not part of the trial in Gareis. And so the plaintiffs
3 that have reviewed the transcripts, the plaintiffs that, you
4 know, from Minnesota and from across the country who came to
5 sit and watch some or all of the trial in Gareis can't
6 recommend to their client that they come and have their
7 cases tried here. So that's really where we're at right
8 now.

9 But Minnesota law is something that these
10 plaintiffs thought that they would have applied and was not
11 applied. And Judge Noel, to your question, I found on my
12 computer. It's titled *In Re Depuy Orthopedics Incorporated*,
13 and the number that the Fifth Circuit gave it was number
14 17-10812, Fifth Circuit 2017. It's a strange number, so
15 maybe it --

16 THE COURT: 2017?

17 MS. ZIMMERMAN: It doesn't seem right to me
18 either. I don't know if it's just that it's new or because
19 it was initially a mandamus. But the other issue in that
20 case though was that jurisdiction was a problem for *Depuy*
21 because it was not a company that was, I mean, I believe
22 that their principle place of business and their home state
23 of incorporation is New Jersey. But, you know, obviously,
24 we don't have that here where 3M is a home state here in
25 Minnesota.

1 So then the issue is not so much about initial
2 personal jurisdiction over the defendants, but that doesn't
3 change the venue issue with respect to where should the case
4 properly be tried? And so those two issues were both
5 simultaneously considered by the Fifth Circuit with respect
6 to that *Lexecon* retraction issue, and so it was a little bit
7 more complicated in some respects for the defendants there
8 because the personal jurisdiction issue was different than
9 what we have here.

10 MAGISTRATE JUDGE NOEL: Going back to my question
11 about settlement approach, has the plaintiffs' committee
12 talked about some of the things that Mr. Blackwell raised,
13 which is what kind of categories the cases should be put in
14 for various purposes for making some kind of settlement
15 demands and then maybe getting a settlement conversation
16 moving forward?

17 MS. ZIMMERMAN: Well, I certainly think that
18 that's an excellent question, Your Honor, and it's one that
19 I would hope that the parties could entertain
20 collaboratively. I think that, you know, setting aside
21 Gareis, I think that the lawyers that have been involved in
22 litigating these cases understand the issues with respect to
23 medicine, with respect to latency, and probably we'd have
24 some disagreement about, you know, how long is too long
25 after a surgery to have an infection?

1 I suspect, you know, Mr. Blackwell might say two
2 weeks, and, you know, we might point to the international
3 consensus and say two years, but, you know, that's kind of
4 an issue of what is the duration of time?

5 I think it's certainly possible that if we sat
6 down and that we'd be willing to do so, that we could come
7 up with some creative ways to kind of really better
8 understand the universe of cases. But the focus of the
9 parties thus far has been on trying the case and getting the
10 other cases worked up and not towards resolution, and we
11 certainly welcome the Court's advice or suggestions in how
12 we might move it that way.

13 MAGISTRATE JUDGE NOEL: Okay. Well, with regard
14 to this *Lexecon* issue, I think the Court will take it under
15 advisement and issue a ruling shortly. We will direct our
16 law clerks to be sure to communicate with counsel to make
17 sure we can get a copy of what it is they're talking about
18 with regard to this *Depuy* case. I don't even know how to
19 spell *Depuy*, so.

20 All right. Then marching through the agenda, the
21 next issue is the plaintiffs' fact sheets. Is there
22 anything anybody wants to tell us about that beyond what we
23 have? It's my understanding the Court has a fair amount of
24 information. Mr. Hulse, is this something you want to
25 address?

1 MR. HULSE: All I wanted to point out, Your Honor,
2 we've briefed it. Some oppositions have been filed. We did
3 file, I think, at least three letters since the filing of
4 our motion to dismiss indicating that we were able to reach
5 a resolution and withdraw our motions as to several of
6 these, and I just wanted to note that for the record and
7 make sure that the Court has seen that. But otherwise we
8 stand on our papers.

9 MAGISTRATE JUDGE NOEL: And which are, do you have
10 them on the tip of your tongue there or on a piece of paper
11 which ones you are withdrawing the motion?

12 MR. HULSE: Yes, I can do it. So I'll just go
13 through the case names and numbers. They are Gottfried,
14 Number 18-0078.

15 MAGISTRATE JUDGE NOEL: All right.

16 MR. HULSE: Harris, 18-0080.

17 MAGISTRATE JUDGE NOEL: Actually, maybe I can
18 short circuit it. Let me tell you what I've got, and you
19 tell me if I'm missing anything.

20 MR. HULSE: All right.

21 MAGISTRATE JUDGE NOEL: So I've got Gottfried,
22 Holstine, Harris, Coleman, Proffit, Guenther, Owens, Hurley,
23 and Ciccone.

24 MR. HULSE: The last one, Your Honor is,
25 Hoerbert, H-O-E-R-B-E-R-T, and that we withdrew the motion

1 on that one I think just yesterday, and that was 17-3616.

2 MAGISTRATE JUDGE NOEL: Okay, I got it. Thank
3 you. And then we have no response by plaintiffs as to
4 Hoyos, Brainerd, Koors, Gibson, Berzsenyi, Bardwell, Patrick
5 and Robinson. Is that what you have?

6 MR. HULSE: Yes, Your Honor. And Koors was
7 actually dismissed. So you don't have to worry about that
8 one.

9 MAGISTRATE JUDGE NOEL: Okay. Dismissed by
10 plaintiff?

11 MR. HULSE: Correct.

12 MAGISTRATE JUDGE NOEL: And then there is seven
13 where there are responses. Is there anything else you want
14 to tell me about any of those seven?

15 MR. HULSE: Your Honors, I would just say that
16 they all fall into categories that prior cases have.
17 Typically, they say we weren't able to reach the plaintiff
18 for some period of time. Please give us more time. And in
19 the past, the Court has dismissed those cases.

20 MAGISTRATE JUDGE NOEL: Okay. Thank you.

21 MR. HULSE: Thank you.

22 MAGISTRATE JUDGE NOEL: Ms. Zimmerman, am I
23 correct then with respect to those last ones? Hoyos,
24 Brainerd, Gibson, Berzsenyi, Bardwell, Patrick and Robinson,
25 there is no response?

1 MS. ZIMMERMAN: That is my understanding as well,
2 Your Honor.

3 MAGISTRATE JUDGE NOEL: And then the seven as to
4 which there are responses, is there anything else you want
5 to tell us other than what's in the papers?

6 MS. ZIMMERMAN: I don't speak on behalf of all the
7 plaintiffs. There may be one or two counsel that are on the
8 phone or in the gallery right now that may want to address
9 the Court, but I don't have anything beyond what has been
10 submitted on the papers for those particular cases.

11 MAGISTRATE JUDGE NOEL: Let me just state the
12 names of those seven then and see if anybody wants to speak.
13 There is Jenkins, 17-3014. Whit, 17-3464. Adams --

14 THE COURT: She's going to unmute it so I can hear
15 if there is anybody.

16 MAGISTRATE JUDGE NOEL: Okay. So let me start
17 over again. Thank you. Jenkins, 17-3014, is there anybody
18 who wants to speak on Jenkins? Hearing none.

19 Whit, 17-3464. Is someone speaking?

20 MS. TREACY: Oh, yes. Sorry, Your Honor. Hi, my
21 name is attorney Julie Treacy. I'm calling from the law
22 offices of Travis Walker in Florida, and I did want to speak
23 on behalf of one of the plaintiffs that you mentioned.

24 MAGISTRATE JUDGE NOEL: Which one is that?

25 MS. TREACY: That would be Robinson, Your Honor.

1 MAGISTRATE JUDGE NOEL: But you haven't filed a
2 response, is that correct?

3 MS. TREACY: Yes, we have, Your Honor. Actually,
4 we have filed a response, and we also filed an updated
5 response recently, just recently.

6 MAGISTRATE JUDGE NOEL: Recently, like since we've
7 taken the bench? Or recently since like yesterday?

8 MS. TREACY: Since just earlier this week, Your
9 Honor.

10 MAGISTRATE JUDGE NOEL: Okay.

11 MS. ZIMMERMAN: Perhaps we can continue that one
12 for a month if there has been a response. I haven't seen
13 it, but.

14 MR. HULSE: Nor have we seen that response, Your
15 Honor.

16 MAGISTRATE JUDGE NOEL: Apparently, nobody
17 including the Court has seen that response. Why don't we
18 take the suggestion --

19 MS. TREACY: It was served on the portal, and we
20 did send an e-mail out to opposing counsel advising that we
21 had attempted to cure and reserved the PFS, but we are happy
22 to do it again.

23 THE COURT: Make sure it's the right number. Is
24 that 18 --

25 MAGISTRATE JUDGE NOEL: The docket number is

1 18CV263, is that your case?

2 MS. TREACY: One moment, let me double check. I
3 need the case number. One moment, Your Honor, I'm going to
4 pull it up on the portal itself.

5 MR. HULSE: I think there may be, Your Honors,
6 plaintiffs' counsel may be referring to serving a PFS rather
7 than filing --

8 MAGISTRATE JUDGE NOEL: A response to the motion.

9 MR. HULSE: Yes. We're not aware of a curative
10 PFS either.

11 THE COURT: It sounds like she's looking.

12 MS. TREACY: I'm having a hard time hearing. I'm
13 sorry.

14 MAGISTRATE JUDGE NOEL: What Mr. Hulse said is
15 that he thinks there may be some confusion as to whether you
16 have filed an curative plaintiff fact sheet as opposed to a
17 response to the motion to dismiss. Have you filed both of
18 those things?

19 MS. TREACY: Oh, no, I apologize, Your Honor. We
20 filed a -- or we served a curative PFS. We did not file a
21 response to the motion to dismiss. I apologize for the
22 confusion.

23 MAGISTRATE JUDGE NOEL: Okay.

24 THE COURT: Did she find the case number yet?

25 MAGISTRATE JUDGE NOEL: Are we correct on the case

1 number 18-263?

2 MS. TREACY: I'm sorry, I'm still looking. For
3 whatever reason it's not --

4 MS. ZIMMERMAN: Perhaps rather than spend the
5 Court's time on it --

6 MAGISTRATE JUDGE NOEL: Well, let's do this, in
7 light of this, let's put this on for next month. Any
8 objection to that, Mr. Hulse?

9 MR. HULSE: Your Honor, I would suggest that it
10 seems readily verifiable whether a PFS was in fact, a
11 curative PFS was provided. I'm sure we could determine that
12 today or tomorrow within 24 hours, and I would suggest that
13 if one has not been provided, that the case should be
14 dismissed.

15 MAGISTRATE JUDGE NOEL: All right. I'm going to
16 say let's put this on for next month because it's not my
17 problem.

18 (Laughter.)

19 MS. TREACY: Thank you, Your Honor.

20 MS. ZIMMERMAN: In time for your retirement.

21 MAGISTRATE JUDGE NOEL: In the meantime, I'm sure
22 within the next 30 days, the parties can figure out whether
23 there is or isn't a plaintiff fact sheet for Mr. or
24 Ms. Robinson.

25 MS. ZIMMERMAN: Yes, Your Honor.

1 MS. TREACY: Yes, Your Honor. Thank you.

2 MAGISTRATE JUDGE NOEL: All right. So then the
3 next case that we do have a response on is Adams, 17-4467.
4 Anybody want to speak to Mr. or Ms. Adams? Okay, hearing
5 none.

6 There is then Grimsley, 17-4872. Anybody wish to
7 speak on Mr. or Ms. Grimsley's case? Hearing none. That
8 takes us to Richey, 17-5323.

9 MR. HODGES: Your Honor, I'd like to be heard on
10 that one.

11 THE COURT: Okay. Mr. Hodges?

12 MR. HODGES: David Hodges appearing on behalf of
13 Priscilla Richey. Judge, I think this one is a little bit
14 different from some of the others where people have been --
15 we've lost track of them, haven't got a response. In this
16 case we spoke to the client in March of this year and then
17 she died apparently in April. We would request 90 days to
18 get ahold of the heirs and figure out whether or not they
19 want to proceed with the case.

20 MAGISTRATE JUDGE NOEL: This isn't the one that
21 has the date of death missing?

22 THE COURT: No, that's the next one.

23 MAGISTRATE JUDGE NOEL: So you're asking for
24 90 days to comply with pretrial order number 23 about
25 substituting parties?

1 MR. HODGES: Yes, Your Honor.

2 MAGISTRATE JUDGE NOEL: Mr. Hulse?

3 MR. HULSE: So, Your Honor, actually I would agree
4 that Richey should fall into a different category. When
5 we've got a plaintiff who has passed away, that puts it
6 under PTO23. It's something that we didn't realize when we
7 filed this motion.

8 We separately filed a motion to dismiss under
9 PTO23 under paragraph E, which provides for this which is
10 that when an untimely, when a suggestion of death is not
11 timely filed, that case should be dismissed with prejudice.
12 So that motion is out there. Plaintiffs, I'm not sure if
13 they've responded to it yet, but what I would suggest is we
14 take care of this case through the PTO23 process rather than
15 this motion, rather than the PTO-14.

16 MAGISTRATE JUDGE NOEL: And just to make sure I'm
17 clear, your motion under pretrial order number 23 is that
18 all of this should have happened before June 28th?

19 MR. HULSE: That's -- I don't remember the date
20 precisely, but a suggestion of death was not filed within
21 90 days of death as is required by PTO23. And if you are
22 going to modify that, there has to be a showing of good
23 cause and so forth, and there never was a motion to extend
24 that deadline on suggestion of death.

25 MR. HODGES: I think it was three days late, Your

1 Honor.

2 MAGISTRATE JUDGE NOEL: Okay. We'll take that
3 under advisement. Thank you, Mr. Hodges.

4 The next is Nickell, 17-4285. Anybody wish to
5 speak to that? Hearing none --

6 MR. OLINDE: I'm sorry, Your Honor, what's the
7 name?

8 MAGISTRATE JUDGE NOEL: Nickell, the name is N as
9 in Nancy, I as in Ignat, C as in Charlie, K as in king, E as
10 in Edgar, L as in Larry, L as in Larry.

11 MR. OLINDE: No.

12 MAGISTRATE JUDGE NOEL: Not your's?

13 MR. OLINDE: No, Your Honor.

14 MAGISTRATE JUDGE NOEL: Who is speaking on the
15 phone?

16 MR. OLINDE: I'm sorry, it's Fred Olinde. I have
17 Carlos Pimentel. And my name is Olinde, O-l-i-n-d-e.

18 MAGISTRATE JUDGE NOEL: Thank you. And then we
19 have Pimentel, anybody wish to speak?

20 MR. OLINDE: Yes, Your Honor. It's Mr. Olinde
21 again, O-l-i-n-d-e, and I represent Mr. Pimentel.

22 MAGISTRATE JUDGE NOEL: And you wish to speak to
23 the motion to dismiss?

24 MR. OLINDE: Yes, Your Honor. We filed an
25 opposition. We had attempted to cure deficiencies twice

1 before. There are only a couple of petitions, he's on this
2 sheet. One was an employer's address, and he worked for the
3 U.S. Navy for 20 years. We were speaking to him in May and
4 for whatever reason we haven't been able to contact him, but
5 it's only been two months. And I would like 90 days to try
6 to get in touch with Mr. Pimentel, who is 80 years old, to
7 try to just cure these last couple of deficiencies. It's a
8 substantially complete fact sheet. That's all I wish to
9 say.

10 MAGISTRATE JUDGE NOEL: Okay. All right. Thank
11 you. Here's what we're going to do with regard to these
12 motions to dismiss:

13 With regard to Jenkins, 17-3014, that motion will
14 be granted. With regard to Witt, 17-3464, that motion will
15 be granted. With regard to Adams, 17-4467, the Court will
16 grant an additional 60, not 90, an additional 60 days to
17 cure the deficiencies in the plaintiffs' fact sheet. With
18 regard to Grimsley, 17-4872, that case will be dismissed
19 without prejudice. With regard to Richey, 17-5323, that
20 motion to dismiss is denied. With regard to Nickell, it's
21 my understanding that there's a hearing set on that
22 regarding the motion to dismiss under rule or under pretrial
23 order number 23.

24 THE COURT: August 16th.

25 MAGISTRATE JUDGE NOEL: We'll just leave that as

1 scheduled. It's a hearing, as I understand it, before Judge
2 Ericksen on August 16th. So there was nobody on the phone
3 who represent -- do you know, Ms. Zimmerman, who represents
4 the Nickell case?

5 MS. ZIMMERMAN: I do not, Your Honor.

6 MAGISTRATE JUDGE NOEL: Mr. Hulse, have you had
7 communication with a particular lawyer for the Nickell?

8 MS. ZIMMERMAN: Actually, I do, Your Honor. My
9 records, and I believe Mr. Hulse's records show that that
10 plaintiff is represented by the Gustafson Gluek firm here in
11 Minneapolis.

12 MAGISTRATE JUDGE NOEL: Is there anybody here from
13 Gustafson Gluek?

14 MS. ZIMMERMAN: I don't see anybody.

15 MAGISTRATE JUDGE NOEL: I guess the problem, the
16 issue is we don't know what day the plaintiff died, correct?
17 And that's the genesis of the motion to dismiss?

18 MR. HULSE: I think the motion to dismiss does
19 specify the date of death, which was indicated in the
20 suggestion of death. Nickell is its own animal because we
21 move the PTO23 motion has to do with Mr. Nickell, but there
22 is also a non derivative, free standing consortium claim by
23 the spouse. The spouse is still not in compliance with the
24 PFS requirement, and so what we're seeking here is to
25 dismiss Mrs. Nickell's claim and then address Mr. Nickell's

1 claim through the PTO23 motion.

2 MAGISTRATE JUDGE NOEL: Okay. We missed that.
3 Thank you for that clarification. In any event, we'll leave
4 the hearing on for August 16th. You can argue about it
5 then.

6 And with regard to Pimentel, that's 17-3899, the
7 request for an additional 90 days to comply with the
8 plaintiffs' fact sheet requirement will be granted, so the
9 lawyer that was speaking get on it and get that done.

10 MR. OLINDE: Thank you, Your Honor, I will.

11 MAGISTRATE JUDGE NOEL: All right. So that was
12 Item Number 2 on the agenda, correct, plaintiff fact sheets?
13 And that brings us to Item 3, which is an update on the
14 number of status of cases in the MDL.

15 Anything, Ms. Zimmerman, you want to add? I've
16 got the 4,641 number.

17 MS. ZIMMERMAN: Yes, Your Honor. I have an
18 updated number from yesterday afternoon, and I believe it's
19 5,033.

20 MAGISTRATE JUDGE NOEL: 5,033?

21 MS. ZIMMERMAN: Yes.

22 MAGISTRATE JUDGE NOEL: Does that comport with
23 your understanding, Mr. Blackwell?

24 MR. BLACKWELL: Ms. Young, does that comport with
25 your understanding?

1 MS. YOUNG: I do think that is more than what we
2 understand. Wouldn't have been a difference in the last
3 week, in any event, but we can compare those numbers.

4 MS. ZIMMERMAN: I'm happy to do that. The e-mail
5 I got from the Pritzker Hageman firm, who are our liaison
6 counsel last night, 5,033 as of yesterday at 12:49.

7 MAGISTRATE JUDGE NOEL: Okay. Ms. Young, you and
8 Ms. Zimmerman will talk and make sure that you're all on the
9 same sheet and that cases aren't falling through cracks
10 somewhere.

11 MS. YOUNG: We will. Thank you.

12 MAGISTRATE JUDGE NOEL: All right, thank you.

13 Anything we need to know about State Court
14 proceedings, Ms. Zimmerman?

15 MS. ZIMMERMAN: Your Honor, the appeal, the
16 response, and the reply are all in. We are waiting for the
17 Minnesota Court of Appeals to set oral argument and that's
18 where we're at right now.

19 MAGISTRATE JUDGE NOEL: Okay. Anything else on
20 that one? Mr. Blackwell?

21 MR. BLACKWELL: Nothing further, Your Honor.

22 MAGISTRATE JUDGE NOEL: And then there's the
23 Canadian action still just up there in Canada north of the
24 border?

25 MS. ZIMMERMAN: I believe that's correct, Your

1 Honor.

2 MAGISTRATE JUDGE NOEL: Okay. There are no
3 pending pretrial orders that need to be addressed, correct?

4 MS. ZIMMERMAN: Correct, Your Honor.

5 MR. BLACKWELL: Agreed, Your Honor.

6 MAGISTRATE JUDGE NOEL: And that brings us to the
7 status of discovery on the second bellwether, which in light
8 of the dismissal of *Hives* leaves *Axline* as the only other
9 bellwether that has been nominated by both parties, correct?

10 MS. ZIMMERMAN: Yes, Your Honor, that's correct.

11 MR. BLACKWELL: That's correct.

12 THE COURT: Is there anything we need to address
13 with regard to getting ready for *Axline* other than ruling on
14 this business we talked about earlier regarding the *Lexecon*
15 waiver?

16 MS. ZIMMERMAN: If I could briefly as Your Honor
17 just referenced the *Lexecon* issue, to the extent that in
18 light of the discussion today, we'd like to have a formal
19 briefing on that, if that would be helpful to the Court.
20 And then, obviously, there's the issue with respect to
21 Dr. Lombardi's deposition that was supposed to happen on
22 Monday night I think it is or Tuesday night, and we have a
23 number of both hospital inspections and depositions
24 happening in Ohio next week.

25 MS. AHMANN: I have nothing to add other than we

1 will have to find out when Dr. Lombardi is available, and we
2 will talk with the plaintiffs' counsel about when that can
3 happen and what -- I would imagine the only extension would
4 need to be relative to that.

5 MAGISTRATE JUDGE NOEL: Let me go through some of
6 the items that are listed here in the agenda itself. Did
7 the deposition of Dr. Wynn occur as planned?

8 MS. AHMANN: Yes.

9 MAGISTRATE JUDGE NOEL: And the deposition of
10 Dr. Smith occurred?

11 MS. AHMANN: Yep, and the plaintiffs' depositions
12 went forward.

13 MAGISTRATE JUDGE NOEL: And her's, plaintiff and
14 spouse?

15 MS. AHMANN: Yep.

16 MAGISTRATE JUDGE NOEL: And so then there's
17 Lombardi. What about the anesthesiologist Dr. Narcelles,
18 that is next week?

19 MS. AHMANN: Next Monday, and we will be doing an
20 inspection also of the hospital OR.

21 MAGISTRATE JUDGE NOEL: At that same time?

22 MS. AHMANN: That evening.

23 MAGISTRATE NOEL: Okay. Well, I will leave it to
24 the lawyers to figure out what to do about Mr. Lombardi,
25 Dr. Lombardi, and report as soon as you have an update. As

1 I said earlier, I think the goal is that the December 3rd
2 trial date will not change. The Court will be issuing a
3 ruling regarding the *Lexecon* waiver. I think we have
4 everything we need with the *Depuy* case that counsel for the
5 plaintiff has identified together with the briefing from the
6 defendants, I believe the Court is going to be prepared or
7 in a position to make a ruling regarding that issue shortly.

8 MS. AHMANN: And I would anticipate that we will
9 know when Dr. Lombardi is available shortly too.

10 MAGISTRATE JUDGE NOEL: Okay. The last item is
11 post-trial motions in *Gareis*. And as I understand it,
12 there's a scheduling order in place and there's a brief due
13 today, yesterday. Did that get filed?

14 MR. HULSE: We filed our brief, yes, and I should
15 mention there was also a bill of costs submitted too.

16 MAGISTRATE JUDGE NOEL: Okay. Anything else for
17 the good of the order, Ms. Zimmerman?

18 MS. ZIMMERMAN: We don't have at this point, and I
19 don't know if the Court would take oral argument on the
20 motion for a new trial. We don't have a date set at this
21 point and had been told to just set it as to be determined,
22 so we'll wait for the Court's instruction with that. And
23 then we have also filed an objection to bill of costs, so
24 perhaps that will come up next month.

25 MAGISTRATE JUDGE NOEL: Okay. Ms. Conlin or any

1 of the other plaintiffs' lawyers have anything?

2 MS. CONLIN: No, Your Honor, but in light of your
3 impending retirement, we, on behalf I'm sure of all the
4 lawyers here, we thank you for your service, longstanding
5 service to the citizens and companies in Minnesota.

6 MAGISTRATE JUDGE NOEL: Thank you very much. And
7 thank you all for your great work on this case. It's been a
8 fascinating experience, and I thank Judge Ericksen for
9 allowing me to participate as she has, and this has been a
10 good experience for me. So thank you.

11 MS. ZIMMERMAN: Thank you, Judge. Anybody else?

12 MR. FARRAR: Nothing, Your Honor.

13 MR. ASSAAD: No, Your Honor.

14 MAGISTRATE JUDGE NOEL: Okay. Anything else for
15 the defendant, Mr. Blackwell?

16 MR. BLACKWELL: Nothing further from the
17 defendants, Your Honor. And thank you as well.

18 MAGISTRATE JUDGE NOEL: Okay. Thank you all very
19 much. We are in recess.

20 (Court adjourned at 3:02 p.m.)

21 * * * *

REPORTER'S CERTIFICATE

I, Maria V. Weinbeck, certify that the foregoing is
a correct transcript from the record of proceedings in the
above-entitled matter.

Certified by: s/ Maria V. Weinbeck

Maria V. Weinbeck, RMR-FCRR

MARIA V. WEINBECK, RMR-FCRR
(612) 664-5109